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Supreme Court, U.S.
FILED

No. 08-189 AUG 12 2008

IN THE OFFICE OF THE CLERK

Supreme Court of the United States

STROMAN REALTY, INC.,
Petitioner,

v.

JIM ANTT, JR., *et al.*, Defendants,
Simone Marstiller, Secretary of the Department of Business and Professional Regulation for the State of Florida; JEFF DAVI, Commissioner of Department of Real Estate for the State of California,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

There is a substantial question regarding the standard to apply when assessing personal jurisdiction over a public official in a claim against him in his official capacity, particularly given that the foundation of the minimum contacts test is the personal liberty interest of the due process clause which involves individual, not state, rights.

The questions presented for review are:

1. Whether the courts should apply a tort or "doing business" analysis in determining whether a federal court's exercise of personal jurisdiction is proper when the claim is against a state official acting in his official capacity.

2. Whether a due process analysis is appropriate in a claim against a state official brought under *Ex parte Young* where state jurisdictional criteria are met.

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner, Stroman Realty, Inc. ("Stroman"), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 528 F.3d 382. App.1a-9a. The final judgment and opinion of the United States District Court for the Southern District of Texas is unreported. App. 10a-

35a. The district court's opinion finding it had personal jurisdiction over the Commissioner of the Department of Real Estate for the State of California and the Secretary of the Department of Business and Professional Regulation for the State of Florida is reported at 20 F. Supp. 2d 1050. App. 36a-52a.

JURISDICTION

The district court had jurisdiction over petitioner's claims pursuant to 28 U.S.C. § 1331. The court of appeals had jurisdiction to review the district court's final judgment pursuant to 28 U.S.C. § 1291. The court of appeals filed its opinion on May 14, 2008 and amended the opinion on June 18, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment provides:

> nor shall any State deprive any person of life, liberty, or property, without due process of law . . . .

U.S. Const. amend. XIV § 1.

Tex. Civ. Prac. & Rem. Code Ann. § 17.041 provides:

> In this subchapter, "nonresident" includes:
>
> (1) an individual who is not a resident of this state; and
>
> (2) a foreign corporation, joint-stock company, association, or partnership.

Tex. Civ. Prac. & Rem. Code Ann. § 17.042 provides:

> In addition to other acts that may constitute doing business, a nonresident does business in this state if the non-resident:
>
> . . .
>
> (2) commits a tort in whole or in part in this state;
>
> . . . .

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

STATEMENT OF THE CASE

1.a. Petitioner Stroman has specialized in the sale of timeshare interests on behalf of individual owners since 1979. App. 12a. A timeshare is an interest in land and is also referred to as vacation ownership. *See* App. 10a. Stroman's only office is located near Houston, Texas. App. 12a. Stroman is a Texas licensed real estate broker employing Texas licensed real estate agents. Stroman's agents perform services only at the Texas office and do not travel to other states to engage in brokerage activity. *See* App. 12a, 54a.

Stroman spends millions of dollars each year in its promotional efforts. App. 13a. Stroman does not use cold calls or pressure sales. App. 2a. Instead, it uses direct mail, the internet, and national and local newspapers to reach potential customers. *Id.* Stroman maintains over 160 toll free numbers to enable interested buyers and sellers to contact it in Texas. App. 13a. Stroman has brokered sales with buyers and sellers from all fifty states and eighty-six countries. App. 12a. Stroman has brokered the sale of properties located at 1,250 different resorts in forty-seven states and twenty-nine countries. *Id.*

To finance its nationwide advertising and promotional efforts, Stroman charges a fee to register timeshare properties for sale in its database. App. 13a. Stroman advertises timeshares both generically as well as listing individual timeshares on Stroman's website. *Id.* Upon the sale of a timeshare, Stroman also charges a commission of ten percent or $750.00, whichever is larger. App. 2a. Stroman advertises on behalf of Texas residents who own California and Florida-based timeshares. App. 54a.

1.b. In 1990, respondent, the Commissioner for the Department of Real Estate for California ("DRE"), issued an Order to Desist and Refrain against Stroman because it was not licensed as a California broker, for soliciting California residents, and for Stroman's failure to submit its advertising materials for approval to the California Real Estate Commissioner. App. 63a-65a. DRE served Stroman with this order by mail in Texas. App. 4a. DRE issued another Order to Desist and Refrain against Stroman in 1997. App. 60a-62a. It again charged Stroman with acting without a California broker's license, for soliciting California residents, for advertising in the

San Francisco Chronicle, and for failing to submit its promotional materials to DRE for approval. *Id.*

On the same day it issued the desist and refrain order, DRE sent the order to the Texas Real Estate Commission advising it of the order and asserting that it was "the latest in a number of Orders issued against Stroman. . . ." App. 66a. The DRE further advised that it intended to "notify the ERA franchise headquarters and the postal authorities" and was "also exploring possible injunctive action" against Stroman. *Id.* In response to DRE's notice and order, the Texas Commissioner undertook an investigation into Stroman's activities and reported back to DRE. App. 69a-70a.

In addition to the orders and communications with the Texas Real Estate Commission, DRE sent a letter to Stroman's counsel in Texas advising it that Stroman's interstate activity was not exempt from California's licensing and regulatory requirements. App. 55a-59a. DRE further asserted that it was entitled to regulate Stroman's conduct even when no California resident was involved in the transaction if the timeshare was located in California. App. 42a.

On its website DRE advises brokers that advertising on the internet requires a California real estate license:

> Because the Internet can be read by anyone in any location, advertising your services on the Internet would be considered soliciting a California resident when read by a resident of this state.

App. 84a.

1.c. In 1996, respondent, the Florida Department of Business and Professional Regulation ("DBPR"), contacted Stroman in Texas following DBPR's review of one of Stroman's advertising brochures. App. 71a-74a. DBPR advised Stroman that its collection of a fee to register a Florida timeshare interest in Stroman's computer database constituted a violation of Florida law. App. 71a-72a. DBPR also stated that Stroman was obligated to use a resale purchase agreement with specific terms mandated by Florida law including specific language pertaining to recision periods. App. 72a-74a. DBPR further demanded that Stroman produce documents in Florida. App. 74a.

In March 1997, DBPR again wrote Stroman in Texas reiterating its demand that Stroman produce its agreements related to Florida timeshares. App. 81a-82a. DBPR claimed a right to dictate Stroman's business operations. App. 82a. (asserting there was no business impediment to Stroman to including Florida's statutorily mandated language in Stroman's contracts and deferring payment for Stroman's advertising services until after transfer of property).

In May 1997, DBPR requested documents from the Texas Attorney General's office relating to Stroman. App. 67a. The Texas Attorney General answered the request and provided documents in response to DBPR's demand. App. 68a.

Thereafter, in November 1997, DBPR again contacted Stroman demanding that it pay a fine for violation of Florida law for collection of fees from anyone owning a Florida-based timeshare "regardless of the state of residence of the seller." App. 76a. DBPR further required that Stroman obtain a Florida license and that all individuals who "communicate

with the sellers and buyers must be licensed as brokers or salespersons" by Florida when the timeshare is located in Florida "regardless of where the sellers and buyers are located." App. 78a-79a.

2.a. Petitioner sued the respondents pursuant to 42 U.S.C. § 1983 for violation of the dormant commerce clause, U.S. Const. art. I, § 8, cl. 3. Petitioner sought to enjoin respondents' unconstitutional application of California and Florida real estate and timeshare laws and regulations on Stroman's interstate timeshare resale business.

At the outset of the case, respondents moved to dismiss the complaint on numerous grounds, including lack of personal jurisdiction. The district court held that it had personal jurisdiction over the defendants and rejected the respondents' argument that their enforcement of their statutes occurred in their states. App. 39a. The court observed that the states were part of the national government and that the states sought to "regulate the business of a South-Texas land dealer and his numerous South-Texas customers." App. 40a. The court noted that respondents asserted nationwide authority to regulate business and were "applying their authority against a Texan in Texas." *Id.* In addition, the actions of the respondents, sending orders to Stroman in Texas and using Texas government agencies to further their regulatory goals, subjected the defendants to specific jurisdiction. App. 40a-41a.[1] In exercising jurisdiction, the court found it compelling that both states

[1] The court also found respondents subject to general jurisdiction because different agencies of both Florida and California had state offices in the Southern District of Texas and the officers are part of a larger administrative apparatus which has a permanent presence in Texas. App. 41a.

sought to "enforce their statutes in situations that involve only non-residents as long as the land is in the state." App. 42a.

2.b. Thereafter, Stroman moved for summary judgment on its claim that respondents' application of their laws on Stroman's timeshare resale business violated the dormant commerce clause. The district court found that the business of timeshare resales and Stroman's business in particular, constituted interstate commerce. App. 19a. The court considered the laws and regulations of the respondents and the impact of those regulations on the interstate business of timeshare resales. App. 13a-21a.

The court found that the effects of the respondents' regulations on the market substantially impeded the flow of goods and services among the states. "By the states' positions, a man in Sutter Creek cannot use a broker in Dallas to sell a share in Telluride to a woman in Saint Augustine without the brokers complying with the regulations of California, Texas, and Florida." App. 21a. The court ruled that respondents' application of their laws and regulations on out-of-state "timeshare resellers like Stroman Realty, Inc., unconstitutionally obstructs commerce among the states, [and] irreparably injur[es] Stroman." App. 34a-35a. The court enjoined the respondents from enforcing their real estate and timeshare laws against Stroman. *Id.*

3. Respondents appealed. Fifteen states and commonwealths joined the appeal as amici urging reversal of the district court's judgment. The Fifth Circuit did not reach the merits but reversed on the grounds that the district court had neither general nor specific personal jurisdiction over respondents. The court rejected the district court's finding of jurisdiction over

the California and Florida officials because "they are all members of the federal Union" finding it to be without precedent. App. 6a. It likewise found the presence of other state agency offices within the district irrelevant to the personal jurisdiction analysis. App. 5a-6a.

Applying a "doing business" standard, the court found specific jurisdiction lacking relying largely on its earlier decision in *Stroman Realty, Inc. v. Sam Wercinski*, 513 F.3d 476 (5th Cir. 2008), *petition for cert. filed*, 76 U.S.L.W. 3611 (U.S. May 5, 2008) (No. 07-1387). App.7a-9a. The court found the contacts insufficient because although DRE sent its order to the Texas Real Estate Commission, "[i]t did not request any action on the part of the [Texas] Commission." App. 8a. Therefore, DRE did not "avail itself of any of Texas's protections." *Id.* Thus, the court reasoned that because the letter did "not evidence any . . . anticipation" of being haled into federal court and did not put DRE "on notice that it might be sued," it was therefore "insufficient to establish personal jurisdiction." *Id.*

The court likewise found that DBPR's correspondence and demands sent to Stroman in Texas did not create a basis for personal jurisdiction. App. 8a. DBPR's request for information from the Texas Attorney General's office pursuant to the Texas freedom of information act was held insufficient as a contact for purposes of jurisdiction because Stroman's claim did not arise out of that specific contact. *Id.* Notably, the court declined to consider the respondents' assertion of regulatory authority over Stroman and the resulting impact on Stroman in Texas as part of the personal jurisdiction analysis. *See* App. 7a-9a.

REASONS FOR GRANTING THE PETITION

The Court has never addressed the question of the standard a federal court should apply when determining whether to exercise jurisdiction over a non-resident public official in a case brought under *Ex parte Young*.[2] *See, e.g., Leroy v. Great W. United Corp.*, 443 U.S. 173, 180-81 (1979) (declining to address the question of personal jurisdiction by a Texas federal court over Idaho state officials in a case alleging violations of the commerce clause and pre-emption).

In this case and in *Wercinski*, 513 F.3d 476, the Fifth Circuit held the district courts lacked personal jurisdiction over non-resident state officials. In so doing, the court declined to apply the personal jurisdiction analysis typically applied in tort cases, including cases brought under 42 U.S.C. § 1983. In considering minimum contacts, the court refused to consider the regulatory efforts by the public officials in the forum state and the impact of those efforts on the plaintiff in the forum state as a basis for the exercise of personal jurisdiction. Instead, the court looked only to the physical manifestations of the officials' exercise of authority and applied a "doing business" analysis. Because it found those manifestations wanting, the court held that personal jurisdiction had not been established. Other jurisdictions, however, have applied the *Calder* effects test[3] to assess jurisdiction over public officials in both official capacity and individual liability cases and found such jurisdiction proper.

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[2] *Ex parte Young*, 209 U.S. 123 (1908).

[3] The effects test refers to the jurisdictional analysis set forth by the Court in *Calder v. Jones*, 465 U.S. 783 (1984). *See* note 5, *infra*.

Whether any due process analysis is appropriate in a case against a public official acting in his official capacity is also unanswered. Because such claims are not claims against individuals but rather a claim against the office, it is questionable whether a due process analysis should apply in the first instance after service of process is achieved on the public official pursuant to state law.

This case thus presents two critically important questions. First, if a public official is to be treated as a person for purposes of personal jurisdiction as well as for purposes of the waiver of immunity under the Eleventh Amendment, should the courts apply a different personal jurisdiction analysis than that applied to other defendants. The question of whether unlawful conduct dictates application of a different test if it is undertaken by a state official as opposed to a private citizen is of fundamental importance. Second, when a state official is stripped of immunity but the action is nonetheless state action for purposes of the Fourteenth Amendment, should a due process analysis apply in the first instance. Due process rights have been characterized by this Court as an individual liberty interest but the Court has not addressed how, if at all, this affects a personal jurisdiction analysis in an action against a public official who is sued for acts undertaken in his official capacity.

I. CERTIORARI IS WARRANTED TO CONSIDER WHETHER A "DOING BUSINESS" ANALYSIS OR A TORT ANALYSIS APPLIES IN DETERMINING WHETHER TO EXERCISE PERSONAL JURISDICTION OVER A PUBLIC OFFICIAL ACTING IN HIS OFFICIAL CAPACITY.

This Court should establish the proper framework for assessing personal jurisdiction in official capacity actions under § 1983. Here, the court determined that there were insufficient minimum contacts to exert jurisdiction over respondent state officials who had sent cease and desist letters to Texas, sent a cease and desist order to the Texas Real Estate Commission, which resulted in an investigation of Stroman in Texas, and who sought information regarding Stroman from the Texas Attorney General. App. 7a. The court ignored that the state agencies engaged in these contacts in an ultra vires effort to impose defendants' complete regulatory schemes—licensing, advance fee, advertising, and escrow requirements—on a Texas broker in Texas. The court likewise failed to consider Stroman's allegations that the agencies sought to control business practices and contractual relations in Texas, including those transactions that did not involve any residents of the respondents' states. Instead, the court relied on its earlier decision in *Wercinski* finding lack of jurisdiction over the Arizona Commissioner of the Department of Real Estate. *Id.* In so doing, the court declined to analyze Stroman's § 1983 official capacity claim as a tort, but asked only whether the officials "purposefully avail[ed]" themselves of the privilege

of conducting business in Texas, a test applicable to contract-based actions.[4] App. 7a-8a.

a. How such claims should be characterized is a question of great importance. The nature of the underlying case determines which due process framework applies. *See Miller Yacht Sales, Inc. v. Smith*, 384 F.3d 93, 99 (3d Cir. 2004) ("'[T]here are different considerations in analyzing jurisdiction over contract claims and over certain tort claims.'") (citation omitted); *Dudnikov v. Chalk & Vermilion Fine Arts, Inc.*, 514 F.3d 1063, 1071 (10th Cir. 2008) (in tort context the court examines whether defendant "'purposefully directed'" its acts at forum state and in contract cases whether defendant "'purposefully availed' itself of the privilege of conducting activities or consummating a transaction in the forum state.") (citations omitted).

In contrast to the Fifth Circuit, other courts have treated § 1983 actions as a tort for personal jurisdiction purposes in both individual and official capacity cases and applied the "effects" test set forth in *Calder* or a similar torts-based analysis to establish whether the defendant purposefully directed his activities at residents of the forum state.[5] In *Ziegler v. Indian*

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[4] The "purposeful availment" prong in tort cases differs from that in many non-tort cases, where as part of a separate test the defendant derives "'the benefits and protections' of the forum's laws" or creates "'continuing obligations' between himself and residents of the forum . . . ." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985). In the case of Texas, the long-arm statute provides for jurisdiction where the defendant "commits a tort in whole or in part" in the state. Tex. Civ. Prac. & Rem. Code § 17.042. It does not require that the tortfeasor *also* do business in the state. *See id.*

[5] In *Calder*, the Court held that California had personal jurisdiction over a Florida editor that edited an article in Florida because the "focal point both of the story and of the harm

River County, 64 F.3d 470 (9th Cir. 1995), for example, the Ninth Circuit addressed whether the California court had jurisdiction over Florida sheriffs sued in their individual and official capacities who used their authority to obtain a warrant to arrest a California resident for grand theft, even though the check upon which the theft charge was based was good. In applying the jurisdictional analysis, the court likened plaintiff's § 1983 claim to a tort. *Ziegler*, 64 F.3d at 474. The court went on to hold that, although the sheriffs had not physically entered California, in obtaining the arrest warrant, they had "intentionally directed their actions toward California, for the purpose of having [plaintiff] arrested there and extradited." *Id.* at 475. *See also Trujillo v. Williams*, 465 F.3d 1210, 1220 (10th Cir. 2006) (considering *Calder*'s effects test but declining to find jurisdiction over Virginia prison officials in New Mexico sued in their official capacity because all relevant conduct by Virginia defendants occurred in Virginia where prisoner was housed); *Dial Up Services, Inc. v. Oregon,* 2007 WL 4200756, at *4 (D. Az. Nov. 27, 2007) (applying the *Calder* effects test

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suffered" was California. *Calder*, 465 U.S. at 789. The Court rejected the defendants' proffered analysis under which the forseeability that the article would be circulated in California and have an effect there was insufficient to establish jurisdiction. Instead, unlike the untargeted negligence in a products liability case, the Court determined defendants' "intentional, and allegedly tortious, actions were expressly aimed at California." *Id.* The defendants in that case wrote and edited "an article that they knew would have a potentially devastating impact upon respondent" and that "the brunt of that injury would be felt by" the respondent in California. *Id.* at 789-90. Thus "[a]n individual injured in California need not go to Florida to seek redress from persons who, though remaining in Florida, knowingly cause the injury in California." *Id.* at 790.

and *Ziegler* to declaratory judgment claims against state officials because these "are more akin to tort claims than contract claims.");[6] *James v. York County Police Dep't*, 160 Fed. Appx. 126, 134-35 (3d Cir. 2005) (Pennsylvania district court had jurisdiction over California narcotics officer under effects test based on officer's call to Pennsylvania Attorney General's office, sending a package to that office and testifying against plaintiff at a preliminary hearing because the officer's "allegedly tortious acts were intended to have an impact on [plaintiff] in Pennsylvania.").[7] Even *Wercinski* conceded that "[i]t . . . seems normally accurate to describe as torts, even under the long arm statute, § 1983 suits against public officials for *individual* misconduct." *Wercinski*, 513 F.3d at 483 (emphasis added).[8] Because the official is de-

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[6] The court found jurisdiction lacking because the complaint did "not allege any action by Defendants aimed at the State of Arizona or causing harm in Arizona." *Dial Up Services, Inc.*, 2007 WL 4200756, at *4.

[7] *See also Taylor v. Phelan*, 912 F.2d 429 (10th Cir. 1990) (finding in § 1983 action that Kansas had jurisdiction over a Missouri police officer who gave assurances to Kansas residents they would be safe from harm and over Missouri Police Department where officer informed Kansas criminal suspect warrant had been issued when officer did not have ability to arrest); *Lee v. City of Los Angeles*, 250 F.3d 668, 692-94 (9th Cir. 2001) (holding that New York police officers were subject to California's jurisdiction in § 1983 action arising out of wrongful extradition of California resident); *Overby v. Johnson*, 418 F. Supp. 471, 472 (E.D. Mich. 1976) (Section 1983 claim is a tort within Michigan long-arm statute); *Maney v. Ratcliff*, 399 F. Supp. 760, 766 (E.D. Wis. 1975) (stating that action under § 1983 "should be read against a background of tort law liability.").

[8] In contrast to *Wercinski*, in *Great W. United Corp. v. Kidwell*, 577 F.2d 1256 (5th Cir. 1978), *rev'd on venue grounds sub nom. Leroy v. Great W. United Corp.*, 443 U.S. 173 (1979), the court observed that the Idaho official's attempted extraterritorial

prived of immunity in either case, however, there is no reason to apply a different jurisdictional analysis. The Court should answer the question as to which standard applies and provide needed guidance to the courts.

b. Nor is there a justifiable basis for the Fifth Circuit's distinction between private tort defendants and public officials engaging in unconstitutional conduct, albeit based on their regulatory authority. Given that this Court has expressly held that such officials enjoy no immunity from suits for purposes of injunctive relief, there is no basis for such a distinction. *See Ex parte Young*, 209 U.S. at 155-56; *In re Dairy Mart Conv. Stores, Inc.*, 411 F.3d 367, 372 (2d Cir. 2005) (finding it proper to exercise jurisdiction over Kentucy officials in New York under *Ex parte Young* exception, noting that the state cannot authorize an unconstitutional act). As Justice Stevens has noted, unconstitutional conduct by a state official causes him to become a "tort-feasor". *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984) (Stevens, J., dissenting). Once stripped of his immunity, there is no reason to apply a more onerous analysis simply because the claim is against a public official.[9]

Courts routinely examine the effects of the conduct alleged and apply *Calder* in cases involving defen-

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regulation "had the direct effect of stopping a substantial commercial venture based in Texas" and was analogous to tort cases for intentional interference with commercial relationships. *Kidwell*, 577 F.2d at 1268.

[9] Indeed, the fact that "an official's unconstitutional conduct constitutes state action under the Fourteenth Amendment but not the Eleventh Amendment", *Pennhurst State Sch. & Hosp.*, 465 U.S. at 105 (citation omitted), indicates no due process analysis is appropriate. *See* part II, *infra*.

dants who are not public officials. *See Janmark, Inc. v. Reidy*, 132 F.3d 1200 (7th Cir. 1997). Thus, in *Janmark*, the court found jurisdiction in Illinois over a California defendant proper where defendant called plaintiff's customer in New Jersey, causing the customer to cancel an order pending in Illinois. The court observed that "[t]here is no tort without injury . . . and the state in which the injury (and therefore the tort) occurs may require the wrongdoer to answer for its deeds even if events were put in train outside its borders." *Janmark*, 132 F.3d at 1202. Further, Illinois had "extended its long-arm power to the limit allowed by the Constitution" and "[t]here can be no serious doubt after [*Calder*] that the state in which the victim of a tort suffers the injury may entertain a suit against the accused tortfeasor." *Id. See also Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 433 F.3d 1199, 1211 (9th Cir. 2006) (finding that in declaratory judgment action, California had personal jurisdiction over French associations that obtained orders in France purporting to govern California-based plaintiff's conduct in California, even though effect sought by the French court would be felt in France); *Dudnikov*, 514 F.3d at 1073 (finding personal jurisdiction over nonresident defendant proper in Colorado where defendant sent letter to eBay in California intended to invoke procedures that would stop plaintiffs' auction).[10]

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[10] There is conflict among the circuits regarding how to apply the *Calder* effects analysis. The First, Sixth, Ninth and Tenth Circuits utilize *Calder* to determine whether the defendant has met the "purposeful availment" prong of the three-part test, making separate inquiry as to whether the plaintiff's cause of action arose from defendant's contacts with the forum state and the reasonableness of exercising jurisdiction. *U.S. v. Swiss Am. Bank, Ltd.*, 274 F.3d 610, 624 (1st Cir. 2001) (stating that

Although this Court has never held that a different standard should apply merely because a state official exerts unconstitutional regulatory authority versus committing some other variety of tort, some courts turn a blind eye to the allegations of tortious conduct in official capacity actions and apply a heightened standard, either by segregating the contacts with the forum from the effects of the unconstitutional conduct, or by imposing additional criteria that effectively preclude a finding of personal jurisdiction over the officials. In *Wercinski*, for example, the Fifth Circuit applied an economic benefit criterion to find that the Arizona real estate commissioner was not subject to an official capacity suit in Texas, stating:

> the Commissioner was not engaged in commercial transactions to obtain a commercial benefit by acting in a governmental capacity to enforce Arizona law. Because no such benefit accrues to the Commissioner from her activities relating to

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"*Calder* addressed purposeful availment, rather than relatedness."); *Air Products and Controls, Inc. v. Safetech Int'l, Inc.*, 503 F.3d 544, 552-55 (6th Cir. 2007); *Menken v. Emm*, 503 F.3d 1050, 1059 (9th Cir. 2007); *Dudnikov*, 514 F.3d at 1071-78 (applying *Calder* as part of purposeful availment prong). The Second and Third Circuits, however, treat *Calder* as a test separate from the three-part inquiry that can independently establish jurisdiction. *Marten v. Godwin*, 499 F.3d 290, 297 (3d Cir. 2007) (observing that if a plaintiff satisfies *Calder*'s effects test, "the plaintiff can demonstrate a court's jurisdiction over a defendant even when the defendant's 'contacts with the forum alone . . . are far too small to comport with the requirements of due process' under our traditional analysis.") (citation omitted); *Best Van Lines, Inc. v. Walker*, 490 F.3d 239, 243 (2d Cir. 2007) (suggesting that *Calder* provides the means for demonstrating minimum contacts). This case presents the opportunity to resolve this disagreement.

> Texas, any jurisdiction based upon her having caused an "effect" in Texas is likewise misplaced.

Wercinski, 513 F.3d at 485.[11] The court here engaged in similar reasoning when it examined whether the respondents had "purposefully availed" themselves "of the privileges of conducting business in Texas" and examined the contacts without regard for the effect of the officials' attempted regulatory activity in Texas. App. 7a-8a. *See also Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 954 F.2d 1174, 1177 (6th Cir. 1992)[12] (finding that Michigan did not have jurisdiction over state officials from Nevada, Washington and South Carolina who directed conduct to Michigan that denied Michigan waste generators access to disposal facilities in part because "[t]he defendants' states have undertaken no economic activity in the state of Michigan in relation to the disposal sites.").[13]

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[11] The *Wercinski* court stated that, in making this analysis, it was relying on this Court's decision in *Kulko v. Superior Court*, 436 U.S. 84 (1978). *Wercinski*, 513 F.3d at 485. However, the Court in *Kulko* expressly noted that the domestic relations matter at issue in that case was different from commercial and tort-based cases and observed that the dispute involved an agreement negotiated and signed in New York. *Kulko*, 436 U.S. at 96-97. *Kulko* does not apply to cases where a state agency exerts authority unconstitutionally to alter contracts and business practices in the forum state.

[12] In *Griepentrog*, the plaintiff sought declaratory and injunctive relief to enjoin defendants from barring access to waste disposal facilities, alleging the officials had no authority to do so. *Griepentrog*, 954 F.2d at 1176.

[13] Neither the Texas long-arm statute nor Michigan's includes economic benefit as a prerequisite for jurisdiction in tort cases. *See* Tex. Civ. Prac. & Rem. Code § 17.042; Mich Comp. Laws § 600.705(2) (providing for specific jurisdiction based on "[t]he

Both the Fifth and Sixth Circuits, however, reasoned that a different jurisdictional standard should apply if the claim arises out of the enforcement of state or federal law. *See Wercinski*, 513 F.3d at 486 (stating that the Commissioner's intent for her activities "is to uphold and enforce the laws of Arizona."); *Griepentrog*, 954 F.2d at 1178 (stating that "defendants have acted in accord with federal law and these actions do not give rise to personal jurisdiction."); *see also Hannon v. Beard*, 524 F.3d 275, 281 (1st Cir. 2008) (rejecting defendant prison official's *Wercinski*-based argument that personal jurisdiction was lacking because his activities were not "commercial", stating that the action in *Wercinski* "attacked the validity of that law" and therefore *Wercinski* was inapplicable).[14]

There is, however, no basis for requiring greater forum contacts by a state agent in official capacity actions than from other defendants merely because the official purports to enforce his state's regulatory intent. This Court has rejected constitutional distinctions based on whether allegedly tortious official conduct is in furtherance of a sovereign function. Thus, in *Franchise Tax Bd. of California v. Hyatt*, 538 U.S. 488 (2003), the Court declined to require Nevada to apply California's sovereign immunity statute to a Nevada resident's Nevada suit against the California Tax Board despite California's argument that immunity was required to "avoid interference with California's 'sovereign responsibility' of

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doing or causing an act to be done, *or consequences to occur*, in the state resulting in an action for tort.") (emphasis added).

[14] *Hannon's* characterization of Stroman's claim in *Wercinski* is inaccurate. Stroman attacked the application of Arizona real estate laws to Stroman's Texas-based interstate business.

enforcing its income tax laws." *Hyatt*, 538 U.S. at 498 (citation omitted). The Court observed:

> There is no principled distinction between Nevada's interests in tort claims arising out of its university employee's automobile accident, at issue in [*Nevada v.*] *Hall*, [440 U.S. 410 (1979)] and California's interests in the tort claims here arising out of its tax collection agency's residency audit. . . . If we were to compare the degree to which the allegedly tortious acts here and in *Hall* are related to a core sovereignty function, we would be left to ponder the relationship between an automobile accident and educating, on one hand, and the intrusions alleged here and collecting taxes, on the other. We discern no constitutionally significant distinction between these relationships.

Id. at 498-99.

Whether the defendant is a state official acting beyond his regulatory power or another tort defendant directing harm to residents of another state is a distinction without a difference; both are unlawful. *See Maney v. Ratcliff*, 399 F. Supp. 760, 767 (E.D. Wis. 1975) (rejecting Louisiana police officers' claim that their Wisconsin contacts "were initiated for the purpose of enforcing Louisiana's criminal laws rather than for the defendants' economic self-benefit", stating that "nothing in the [Wisconsin] long-arm statute makes the motive for a defendant's activities determinative of the statute's application. If the defendants' actions fall within the language of the long-arm statute, and if they constitute sufficient 'minimum contacts' . . . then personal jurisdiction may be exercised over them.").

c. In both this case and in *Wercinski*, the court declined to consider Stroman's allegations against the state officials and the impact of their actions on Stroman's business in Texas. Rather than afford § 1983 defendants in official capacity cases special consideration by virtue of their enforcement activities, courts instead should look to the plaintiff's cause of action and the effect of the regulatory conduct on the plaintiff in the forum state. Here, the court did not factor Stroman's underlying allegations — that respondents were acting unconstitutionally to force Stroman to change its contracts and business practices in Texas — into the jurisdictional analysis.

The nature of Stroman's services underscores the importance of examining the underlying allegations in evaluating personal jurisdiction in cases based on asserted regulatory authority. Stroman's advertising and brokerage contracts are personal service contracts governed by the law of the place of performance, which is entirely in Texas. *See Selover, Bates & Co. v. Walsh*, 226 U.S. 112, 123 (1912) (rejecting claim that Colorado law applied to contract for sale of land drafted in Minnesota because it involved Colorado property because the contract was "strictly personal" and "[i]t in no way affects the land or seeks any remedy against it."); *Coldwell Banker & Co. v. Karlock*, 686 F.2d 596, 599 (7th Cir. 1982) ("A real estate brokerage contract is generally characterized as a contract for personal services rather than a contract conveying an interest in land."); *Richland Dev. Co. v. Staples*, 295 F.2d 122, 128 (5th Cir. 1961) (allowing unlicensed broker's suit, court noted that if an "Alabama citizen goes out of the state and enters into a contract that primarily is to be performed in a foreign state, he should expect to forego certain protections that his own state would afford, just as he

becomes entitled to enjoy the protection of the foreign state."). Thus the respondents' regulation does not take place in California or Florida, but in Texas where these contracts are established and performed.[15]

Instead of considering the nature of Stroman's business and the regulation by respondents, however, the court looked narrowly at the officials' communications and documents sent to the state.[16] Likewise, in

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[15] This case is unlike *U.S. v. Ferrara*, 54 F.3d 825 (D.C. Cir. 1995), where the defendant was not setting standards for or directing the behavior of prosecutors in the District of Columbia, but those who were licensed by New Mexico. *Ferrara*, 54 F.3d at 830. Here, the respondents are directing "how [brokerage transactions are] to be conducted" in Texas. *Id.* at 828.

[16] In addition to looking only at discrete contacts rather than Stroman's action as a whole, the court declined to count Florida's attempt to obtain information from the Texas Attorney General's Office regarding Stroman, stating that "[o]nly those contacts out of which the claim arises count in specific jurisdiction analysis" and that "[t]here is no way to construe that contact as a basis for the suit . . . ." App. 8a. However, this Court "has not yet explained the scope of . . . [the arises out of] requirement." *O'Connor v. Sandy Lane Hotel Co.*, 496 F.3d 312, 318 and n.4 (3d Cir. 2007) (noting that although the Court granted certiorari on this question in *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991), the Court decided the case on other grounds); *Miller Yacht Sales, Inc. v. Smith*, 384 F.3d 93, 99-100 (3d Cir. 2004) (observing that "the question of what level of relationship is necessary under the 'arise out of or relate to' requirement. . . . has plagued federal Courts of Appeals and has resulted in divergent rules."); *Chew v. Dietrich*, 143 F.3d 24, 29 (2d Cir. 1998) (describing conflicts among the circuits as to the standard to apply in determining whether a contact "relates to" a claim). Here, contrary to the court's conclusion, the attempt to obtain documents from Texas government offices was part of the Florida agency's overall efforts to impose Florida's regulatory scheme on Stroman in Texas, and is thus related to Stroman's

Wercinski, the court also declined to consider the nature of Stroman's allegations, lest the court "confuse[] fairness with the merits of the case." *Wercinski*, 513 F.3d at 489. Consideration of the nature of the allegations, however, is appropriate.[17]

In contrast to the Fifth Circuit, other circuits look to the nature of the claims alleged in addressing motions to dismiss for lack of personal jurisdiction. For example, in *Hannon*, the First Circuit considered the underlying allegations in plaintiff's § 1983 claim and found they were "more analogous to a tort claim than a contract claim . . . ." *Hannon*, 524 F.3d at 283. The court found that personal jurisdiction comported with due process because the claims arose from the official's contact with Massachusetts in that the injury would not have occurred but for the official's transfer arrangements, the transfer to Massachusetts constituted purposeful availment and jurisdiction was

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claim. This Court should clarify the "arises out of or relates to" test and provide needed guidance to the lower courts.

[17] Indeed, the district court here found that the allegations related directly to "fairness":

> On the one hand, [the states] argue that they may regulate Stroman *even though* it is from a different state, *even though* it conducts its business from a different state, and *even though* it has only tenuous connections with their states. On the other hand, they argue that this court does not have jurisdiction over them *because* they are from different states, *because* they conduct their business from different states, and *because* they have only tenuous connections with this state. They cannot have it both ways. . . . It's a two way street. . . . These aphorisms about double standards and reciprocity are not often jurisprudential, but they articulate an aspect of fair play and substantial justice.

App. 43a (citation omitted).

otherwise reasonable. *Id.* at 282-85. *See also Kidwell*, 577 F.2d at 1267 (court determined that Idaho officials' attempt to regulate a Texas company caused plaintiff to undertake reasonably foreseeable "efforts in Texas to comply with the Idaho state law" and that such regulation had "substantial consequences on important business plans" that satisfied the "minimum contacts requirement.").[18] Likewise, in conspiracy cases, courts examine whether the plaintiff has made a prima facie showing of the underlying civil conspiracy to establish jurisdiction. *See, e.g., Second Amendment Found. v. United States Conference of Mayors*, 274 F.3d 521, 524 (D.C. Cir. 2001) (holding that allegation that mayors discussed legis-

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[18] Reversing *Kidwell* on venue grounds, the Court in *Leroy* found that Great Western's claim arose only in one district and therefore venue was proper only in Idaho. *Leroy*, 443 U.S. at 186. The Court found the basis for Great Western's claim was Idaho's enactment of the statute, Great Western's filing was reviewed in Idaho, the letter was sent from Idaho, the order was entered in Idaho, and that any future action might be taken in Idaho. *Id.* at 185-86. The Court likewise found that Idaho judges were better suited to construe the Idaho law. *Id.* at 186. While the venue analysis is similar to an evaluation of personal jurisdiction, the facts here are considerably different. Here, respondents are not seeking to control the acquisition of a corporation based within their states. They seek to regulate transactions that are personal service contracts performed in a different jurisdiction. Many of the transactions respondents seek to regulate do not even involve residents of the respondent states. In addition, respondents made additional demands on Stroman in Texas and sought information from Texas state regulatory authorities as well as impugned Stroman's reputation with the Texas state agency responsible for regulation of Stroman. Further, Stroman's case does not involve interpretation of state statutes but whether those statutes can constitutionally be enforced against Stroman in its interstate business activities, a question of federal, not state, law.

lative and litigation strategies was insufficient to show conspiracy and therefore court did not have jurisdiction); *see also Indianapolis Colts, Inc. v. Metro. Baltimore Football Club Ltd. P'ship*, 34 F.3d 410, 411 (7th Cir. 1994) (finding Maryland defendant subject to jurisdiction in Indiana in a trademark infringement action, reasoning that "[t]he Indianapolis Colts use the trademarks they seek to defend in this suit mainly in Indiana. If the trademarks are impaired, *as the suit alleges*, the injury will be felt mainly in Indiana.") (emphasis added).

Moreover, there is no basis for the Fifth Circuit's dichotomy between personal jurisdiction and the merits, where the merits of the claim and bases for jurisdiction are intertwined. "[W]here the issue of jurisdiction is dependent upon a decision on the merits. . . . the trial court should determine jurisdiction by proceeding to a decision on the merits" to avoid "making a summary decision on the merits without the ordinary incidents of a trial . . . ." *Schramm v. Oakes*, 352 F.2d 143, 149 (10th Cir. 1965) (dismissal for lack of personal jurisdiction in automobile tort case improper because the appellate court was "unable to say with any degree of legal certainty that the appellants could not make out a valid cause of action against one or more of the appellees."); *see also Sandpiper Village Condo. Ass'n, Inc. v. Louisiana-Pacific Corp.*, 428 F.3d 831, 840 n.12 (9th Cir. 2005) (declining to address whether sufficient minimum contacts existed to exert jurisdiction over defendant because "[a]lthough personal jurisdiction is ordinarily determined at the outset as a threshold matter, in this case that issue is inexorably intertwined with the merits."); *Delong Equip. Co. v. Washington Mills Abrasive Co.*, 840 F.2d 843, 849, 852 (11th Cir. 1988) (finding that the

district court "failed to appreciate the significance" of an alleged meeting involving defendant corporate officer in Georgia and that personal jurisdiction over the officer was appropriate because "if, on the merits, [plaintiff] establishes illegal conduct by" the corporation, the officer could be held personally liable).[19]

Refusing to consider the merits where the officials are alleged to have imposed their regulatory authority with the intent to affect contractual relations and alter business practices in the forum state makes even less sense given that private defendants may be subject to jurisdiction when they "deliver[] . . . products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State" and injury results. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 298 (1980); *see also Nuovo Pignone, SpA v. Storman Asia M/V*, 310 F.3d 374, 381 (5th Cir. 2002) (applying stream of commerce analysis to exercise jurisdiction in tort and contract case over defendant which con-

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[19] Similarly, the courts readily look to the underlying claim to establish subject matter jurisdiction or determine whether the suit is barred by the Eleventh Amendment. *See, e.g., Land v. Dollar*, 330 U.S. 731, 738 (1947) (allegations that government officials exceeded their authority as alleged in plaintiffs' complaint, if true, would determine jurisdiction, therefore court could proceed to the merits); *McBeath v. Inter-American Citizens for Decency Comm.*, 374 F.2d 359, 363 (5th Cir. 1967) (reversing dismissal of Sherman Act claim for lack of jurisdiction, noting "[t]he question of jurisdiction here, including the existence of a conspiracy and a boycott or secondary boycott and their significant effect on interstate commerce, is so inextricably connected with the merits of the case itself that it was error for the court to determine that it lacked jurisdiction" and that "[t]he allegations of the complaint expressly allege a violation of the Sherman Act . . . .").

tracted with third party who brought defective crane to forum state).

The situations here and in *Wercinski* are readily distinguishable from cases where courts have declined to exert jurisdiction over officials who have merely sent state documents into the forum state in the exercise of an administrative function. In *Payne v. County of Kershaw, South Carolina*, 2008 WL 2876592 (N.D. Tex. July 25, 2008), the district court declined to find jurisdiction over South Carolina court clerks who sent earnings withholdings notices to plaintiff's employers in Texas pursuant to support orders entered in South Carolina as part of plaintiff's South Carolina divorce. Although the court called the case "similar to" *Wercinski*, *Payne*, 2008 WL 2876592, at *5, *Wercinski* (and this case) arise from the state officials' attempts to unconstitutionally impose their states' regulatory schemes on the forum jurisdiction and residents within it including Stroman and its Texas clients, affecting contracts and practices in the forum state. In contrast, *Payne* involves mere ministerial acts by the state officials conducted as part of their administrative duties after entry of a court order in their home state. *See also Hannon*, 524 F.3d at 280-83 (finding personal jurisdiction in Massachusetts over Pennsylvania department of corrections head who effected prisoner's transfer, but declining to find jurisdiction over Pennsylvania prison librarian who merely responded to requests plaintiff made from Massachusetts).

II. CERTIORARI IS WARRANTED TO CONSIDER WHETHER A DUE PROCESS TEST IS APPROPRIATE IN AN ACTION AGAINST A STATE OFFICIAL IN A CASE BROUGHT UNDER *EX PARTE YOUNG* WHERE STATE JURISDICTIONAL CRITERIA ARE MET.

In a case involving a claim under *Ex parte Young*, there is a substantial question as to whether a due process analysis is appropriate if the claim is, in reality, one against the state. While the Court has treated such claims as against an individual for purposes of the Eleventh Amendment, it has not held that the official is a person within the meaning of the Fourteenth Amendment. *See Pennhurst State Sch. & Hosp.*, 465 U.S. at 105. Thus, in *Kentucky v. Graham*, 473 U.S. 159 (1985), the Court held that "[a]s long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. . . . It is *not* a suit against the official personally, for the real party in interest is the entity." *Graham*, 473 U.S. at 166; *see also Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989) (noting "suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office."); *McCarthy v. Hawkins*, 381 F.3d 407, 414 (5th Cir. 2004) ("Only for the purposes of the Eleventh Amendment are 'official-capacity actions for prospective relief . . . not treated as actions against the State.'") (quoting *Graham*, 473 U.S. at 167 n.14) (alteration in original).

Personal jurisdiction, however, is "an individual liberty interest" derived from the due process clause. *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites*

de Guinee, 456 U.S. 694, 702 (1982); *see also Shelley v. Kraemer*, 334 U.S. 1, 22 (1948) (the rights created by the due process clause of the Fourteenth Amendment are guaranteed to the individual and the rights established are personal rights). Thus, while *Young* permits a suit against the state in federal court by treating the official as a person for purposes of the Eleventh Amendment, once service has been obtained pursuant to state law,[20] there is no underlying rationale justifying the application of any due process analysis because a state has no due process rights. *See State of South Carolina v. Katzenbach*, 383 U.S. 301, 323 (1966) ("The word 'person' in the context of the Due Process Clause of the Fifth Amendment cannot, by any reasonable mode of interpretation, be expanded to encompass the States of the Union . . . .") (citation omitted). *In re Reserves Dev. Corp. v. Browning*, 64 B.R. 694 (W.D. Mo. 1986), *rev'd on other grounds*, 821 F.2d 520 (8th Cir. 1987) (holding that no minimum contacts analysis was required prior to the bankruptcy court's exercise of jurisdiction over state officials of West Virginia because "a state is not a 'person' under the 5th Amendment.") (citing *Katzenbach*, 383 U.S. at 323). In *Browning*, the court noted that "a suit against defendants in their official capacity is a suit against the state, and the Supreme Court has held that a state does not have standing 'as parent of its citizens to invoke these constitutional provisions against the Federal Government, the ultimate *parens patriae* of every American citizen.'"

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[20] In *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., Ltd.*, 484 U.S. 97 (1987) the Court held that where the federal statute does not provide for service of process, the federal courts must look to the law of the forum state to determine whether personal jurisdiction can be asserted over a defendant. *Omni*, 484 U.S. at 106.

Browning, 64 B.R. at 697(citing *Katzenbach*, 383 U.S. at 324).[21]

That no due process analysis should be required makes even more sense when one considers the ease with which the individual state office holder may be substituted in the litigation, without any consideration as to the individual's actual contacts with the forum. Fed. R. Civ. P. 25(d) provides that where an officer in an official capacity case ceases to hold that office during the pendency of the case, "[t]he officer's successor is *automatically* substituted as a party." (Emphasis added.) The individual officer's role as a mere placeholder in the litigation is more apparent considering failure to name the successor in the suit has no effect on the case. *Id.*; *see also* Wright & Miller, 7C Fed. Prac. & Proc. Civ.3d § 1960 ("If . . . the parties and the court are unaware of the change in the office, they can continue to litigate under the name by which the action was commenced, and the litigation will be entirely valid . . . . When and if a question is raised, the name can be changed, no matter how much time has elapsed."). Because the personal jurisdiction requirement arises from "an *individual*'s liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties or relations'", *Burger King Corp.*, 471 U.S. at 471-72 (emphasis added) (citation omitted), there is no basis for applying a due process test to the real party in interest when it is a state, nor for bestowing due process rights upon an "office". *But see U.S. v.*

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[21] It is reasonable to infer that the district court was alluding to these principles when it observed that the court and the respondents were part of the same government and jurisdiction was proper based on the respondents' exercise of nationwide regulatory authority. *See* App. 40a.

Ferrara, 54 F.3d 825, 831-32 (D.C. Cir. 1995) (concluding that if the official were treated as a state, the language of the District of Columbia long-arm statute would not permit jurisdiction).

Courts have raised the concern that permitting suits against non-resident officials could subject them to litigation nationwide. *See, e.g., Wercinski*, 513 F.3d at 487. Even if there were no due process limitation on the exercise of personal jurisdiction, however, it would not result in such exposure. Other statutes and doctrines require a connection between the official and the forum. *See Leroy*, 443 U.S. at 185-86; 28 U.S.C. § 1391(b) (limiting litigation to those districts "in which a substantial part of the events or omissions giving rise to the claim occurred . . . ."). Likewise, the doctrine of forum non conveniens permits courts to decline to hear cases that could be better decided elsewhere. *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981). Requiring a personal jurisdiction analysis in a case to limit the districts in which an *Ex parte Young* action can be brought is unnecessary in light of these limitations.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 12, 2008

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